BUREAU OF LAND MANAGEMENT

v.

WILLIAM J. THOMAN

IBLA 92-346 Decided April 3, 1997

Appeal from a determination of Administrative Law Judge Ramon M. Child voiding oral authorization to cross an allotment by the Green River Resource Area Manager, Bureau of Land Management. WY-04-91-01.

Affirmed.

1. Appeals: Generally--Rules of Practice: Appeals: Dismissal

An appeal will normally be dismissed as moot where, prior to the filing of a notice of appeal, the action being challenged has already occurred and there is no effective relief which can be afforded the appellant. Where, however, because of the limited duration of the challenged action and the reasonable expectation that the action will recur, there exists a substantial likelihood that a recurrence may evade review, dismissal of an appeal is not appropriate.

2. Grazing and Grazing Lands--Grazing Permits and Licenses

Absent emergency conditions or an agreement between BLM and parties holding grazing privileges in an allotment, 43 C.F.R. § 4160.1-1 (1991) required notification of those permittees and provision of a period of time to protest prior to authorizing trailing through the allotment.

APPEARANCES: Glenn F. Tiedt, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management; W. Alan Schroeder, Esq., Boise, Idaho, for William J. Thoman.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Bureau of Land Management (BLM or the Bureau) has appealed from the determination of Administrative Law Judge Ramon M. Child, issued on

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March 25, 1992, that the January 2, 1991, oral authorization by the Green River Resource Area Manager, BLM, to the Big Sandy and Green River Livestock Company (BS&GR), which had permitted BS&GR to trail 4,100 sheep across the Lombard Allotment in southwest Wyoming, was void because it failed to meet the procedural requirements of the applicable regulations. We affirm.

The regulation at issue, 43 C.F.R. § 4160.1-1 (1991), provided:

> In the absence of a documented agreement between the authorized officer and the permittee(s) or lessee(s), the authorized officer shall serve a proposed decision on any applicant, permittee or lessee, * * * who is affected by the proposed action on applications for permits * * *, or by the proposed action relating to terms and conditions of permits * * *. The authorized officer shall also send copies to other affected interests. The proposed decision shall state reasons for the action, including reference to pertinent terms, conditions and/or provisions of these regulations, and shall provide for a period of 15 days after receipt for the filing of a protest.

(Emphasis added.)

The oral authorization in question was granted on January 2, 1991, pursuant to an oral request by BS&GR originally made on December 28, 1990. The crossing occurred on January 3, 1991. It is clear that, contrary to the above-quoted regulatory language, no "proposed decision" was rendered prior to the oral approval of the Area Manager, nor was any period allowed for protests from those who might be adversely affected. Indeed, on January 2, 1991, William J. Thoman, a grazing preference holder who was authorized to graze sheep within the Lombard Allotment, was informed by a range conservationist of the proposal. After he voiced his objections thereto, Thoman was advised by the range conservationist that he would recommend against approval of the request. Thoman was, in fact, not aware that the Area Manager had authorized the crossing until January 3, 1991, when he personally discovered evidence that sheep had trailed through his allotment. On January 25, 1991, Thoman formally appealed the allowance of the crossing.

The case was originally assigned to District Chief Administrative Law Judge John R. Rampton, Jr. On April 3, 1991, counsel for BLM sought to have the challenge dismissed on the grounds that it was frivolous, that Thoman had suffered no adverse affects and that, in any event, no effective relief could be granted. By Order dated May 8, 1991, Judge Rampton refused to do so, noting that:

> [N]o proposed decision was issued in writing. Mr. Thoman was asked once orally if he objected, and he asserted that he did.

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> No final decision was issued in writing, and Mr. Thoman was not given notice of the decision until he made an inquiry after the fact. There exists a genuine issue of law as to whether such procedures were lawful or whether the decision to authorize trailing is subject to the regulations at 43 CFR Subpart 4160.

(Order of May 8, 1991, at 1).

The matter was subsequently assigned to Administrative Law Judge Child. On September 23, 1991, Thoman sought summary judgment upon two issues of law. Thoman described these issues as:

> (1) Whether the granting of a crossing permit is unlawful when the Bureau verbally asked a permittee whether he objected to the crossing permit, and he said "yes", but the Bureau issued the crossing permit notwithstanding such objection and without the serving of a Proposed/Final Decision?
>
> (2) Whether a decision to authorize a crossing permit is subject to the regulations at 43 CFR Subpart 4160?

In support of his request, Thoman noted that a crossing permit was classified, under 43 C.F.R. §§ 4130.4 and 4130.4-3 (1991), as a form of grazing authorization. 1/

In opposing the request for summary judgment, BLM asserted that the issuance of the crossing permit was in accord with the regulations. Thus, BLM noted that 43 C.F.R. § 4130.4-3 (1991) expressly authorized issuance of crossing permits. It asserted that, under the terms of 43 C.F.R. § 4160.1-1 (1991), it was not required to issue a proposed decision since this regulation only applied "[i]n the absence of a documented agreement between the authorized officer and the permittee" and, in this case, the permittee (by which term BLM meant BS&GR, not Thoman), had agreed to the crossing permit. The Bureau further argued that this permit was, itself, documented by the Billing Notice issued on January 10, 1991. 2/ The Bureau dismissed Thoman's argument that issuance of the crossing permit without notice to him violated section 43 of the Grazing Administration Handbook

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1/ We note that 43 C.F.R. § 4130.4 was redesignated as 43 C.F.R. § 4130.6 on Feb. 22, 1995, and 43 C.F.R. § 4130.4-3 was amended on that same date and designated as 43 C.F.R. § 4130.6-3. See 60 Fed. Reg. 9965, 9967. Neither the redesignation nor the amendment, however, affect in any relevant way the substantive basis of Thoman's assertions.

2/ The Bureau cited the BLM Grazing Administration Handbook (H-4130-1 Authorizing Grazing Use) in support of its assertion. Section 7.71D provides, in relevant part, that "[t]he notice part of the bill * * * may serve as the authorizing document for exchange-of-use or crossing permits."

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H-4130-1, by arguing that the language directing notification 3/ was precatory rather than mandatory and that Thoman had, in any event, been alerted to the possibility that a crossing permit might issue. Finally, BLM argued that, even if its actions had, in some technical sense, violated regulatory provisions, they should still be affirmed since they were in substantial compliance with the applicable regulations.

In an Order dated October 25, 1991, Judge Child granted, in part, summary judgment to Thoman. In this Order, Judge Child expressly found that issuance of a crossing permit was subject to the provisions of 43 C.F.R. Subpart 4160 (citing Jones & Sandy Livestock, Inc., 75 IBLA 40, 43 n.11 (1983)). The Judge also explicitly rejected BLM's contention that, because there was a documented agreement between BLM and BS&GR, no proposed decision was required to be served on Thoman. Judge Child found that, contrary to BLM's argument, under the terms of 43 C.F.R. § 4160.1-1 (1991), BS&GR was properly deemed to be an applicant while Thoman maintained his status as permittee. Thus, since there was no agreement between Thoman and BLM, the requirement that Thoman be served with a proposed decision could not be vitiated by an agreement between BLM and BS&GR.

Notwithstanding the foregoing, however, Judge Child declined to grant summary judgment in its entirety to Thoman, concluding instead that a hearing was still necessary in this matter. Judge Child adverted to this Board's decision in Rudnick v. BLM, 93 IBLA 89 (1986), in which the Board had noted that, notwithstanding the fact that failure to comply with the procedural requirements of 43 C.F.R. Subpart 4160 (1991) rendered any decision rendered voidable, it was still necessary for a party challenging that decision to advance some reason to justify voiding the decision being challenged beyond its procedural irregularity. Judge Child concluded that, under this precedent, Thoman was required to produce evidence that he had suffered harm or damage as a result of BLM's actions. At the same time, Judge Child also afforded BLM an opportunity to show that emergency circumstances existed which prevented it from following the procedures set forth in the regulations. On this basis, he directed that the hearing proceed on schedule.

Considerable evidence was presented to Judge Child at a 1-day hearing held on November 5, 1991. The testimony disclosed that, on December 28, 1990, Edward Taliaferro of BS&GR originally sought approval by BLM of a crossing permit that would authorize 4,100 sheep to cross the Lombard Allotment. Taliaferro was desirous of moving the sheep because of wintry weather conditions affecting the Big Sandy Allotment where the sheep were

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3/ This section of the Handbook, (see note 2, supra), which covered issuance of crossing permits, provided that "[p]ermittees or lessees in allotments where trailing use is planned should be notified by the authorized officer in advance of the actual trailing use."

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then located and because there was additional forage available at a site in the Rock Springs Allotment which would be accessible to the sheep because of its lower elevation. Tr. 125. William Taliaferro, Edward's father, noted that, because of the weather conditions, they had already trucked the ewe lambs to the Rock Springs site and had commenced supplemental feeding of the ewes located on the Big Sandy Allotment at the rate of 170 bales per day. Id.

The route sought by BS&GR crossed the Eighteenmile Allotment and then followed Highway 28 southwesterly across the Lombard Allotment and eventually led to the Rock Springs Allotment in which BS&GR held grazing privileges. At the time of its application, BS&GR had permission to use two other trails (A and B) to reach the Rock Springs Allotment but had no grazing privileges in the Lombard Allotment. 4/

Jim Sparks, a range conservationist responsible for reviewing grazing applications within the Green River Resource Area, testified that, based on his initial discussion with Edward Taliaferro, he recommended that the application be disapproved. Tr. 145-46. Prior to making this recommendation, he contacted Thoman, who advised Sparks that he was opposed to granting the crossing application along the route proposed based on the condition of forage in the Big Sandy River area. Tr. 147. Sparks related to Thoman that he was recommending that the application be denied.

Subsequently, on January 2, 1991, Edward Taliaferro returned to the BLM office. Sparks informed him at that time that the application was being denied and suggested that Taliaferro use either trails A or B. Tr. 146. Later that day, William Taliaferro investigated the condition of trail B. He then approached BLM and reported that trail B needed to be "bladed out or something done * * * in order to make it passable for sheep wagons, pickups or whatever." Tr. 81, 126. He also objected to the use of trail A because "the county hadn't had time to clear the county road around on the Blue Rim," (Tr. 126), although there was no evidence that he had inspected trail A. Tr. 134. Clear roads were important because Taliaferro was using supplemental hay to feed and water the sheep, and hay trucks and wagons to carry feed for the sheep would be necessary during the crossing.

The Area Manager, William Lebarron, orally approved the permit to cross based on the information furnished by William Taliaferro about the condition of trails A and B. No physical examination of either trail A or B was made by BLM employees prior to this approval. Lebarron's approval was given on the afternoon of January 2, 1991, and the crossing occurred the next morning without any further contact with Thoman. Thoman testified that he became aware of the crossing on the afternoon of January 3, 1991, when he observed sheep tracks along the south side of Highway 28. Thoman

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4/ Trail A was also referred to as the Emigrant or Mormon Trail, while trail B was frequently referred to as the Blue Rim Road.

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telephoned BLM and was informed that the crossing permit had been approved the previous day.

Thoman subsequently examined the conditions on trails A and B on January 5, 1991. Insofar as trail B was concerned, Thoman testified that while snow had drifted across two washouts, he was able to remove the snow with a shovel in both instances. Tr. 207-209. He also stated that neither washout would have prevented sheep from crossing the washout area. Id. With respect to trail A, Thoman noted that he was able to drive the entire length of the trail, bypassing the Big Island Bridge (which was closed to vehicular traffic though not to sheep) by crossing the Green River at the Stauffer Bridge, 3 to 4 miles downstream. Tr. 210-11. Thoman declared that there were no obstructions to sheep trailing along the length of trail A. Tr. 211.

Thoman complained that the crossing by 4,244 sheep across the Lombard allotment caused trampling of the forage and resulted in the consumption of an estimated 28 AUM's (animal unit months). See Govt. Ex. 3. He asserted that the impact on the forage caused him to curtail his use of lambing grounds within the allotment the following spring. Tr. 222.

As noted above, Judge Child's October 25, 1991, Order charged BLM with submitting evidence that the circumstances at the time of the application presented an emergency which prevented the agency from following the procedures set out at 43 C.F.R. § 4160.1-1. Judge Child found that, notwithstanding BLM's arguments to the contrary, no emergency situation existed which necessitated immediate approval of the trailing permit application. Thus, he noted that BS&GR was authorized to continue grazing in the Big Sandy Allotment throughout the month of January. He adverted to the fact that BS&GR had already trucked its ewe lambs to the Rock Springs Allotment, noting that this "suggests that the Livestock Company could have trucked its remaining sheep as well." (Decision at 12.) Moreover, he found that the deterioration in the weather conditions on the Big Sandy Allotment was something which was reasonably foreseeable and that, in effect, "the Livestock Company created an emergency for itself by belatedly applying for the permit and then trailing its sheep through the Eighteenmile Allotment up to the edge of the Lombard Allotment before it was even authorized to do so." (Decision at 14.)

Judge Child expressly found that had BLM provided Thoman with even a minimal notice and protest period he might have been able to present BLM with sufficient information with respect to the passability of trails A and B so as to alter BLM's ultimate decision. (Decision at 12-13.) Thus, BLM's failure to properly notify Thoman was deemed to be not without negative impacts upon the decisionmaking process. Moreover, Judge Child also found that Thoman was harmed by the decision permitting trailing through the Lombard Allotment because of the actual impact upon the forage within the allotment as well as the potential precedent-setting nature of the decision. (Decision at 14.) Pursuant to these findings, Judge Child

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determined that the January 2, 1991, oral authorization of the Area Manager was void and set it aside. The Bureau has duly filed an appeal from this determination.

On appeal to this Board, BLM generally assails Judge Child's findings that no emergency existed sufficient to justify failure to comply with the notice provisions of 43 C.F.R. § 4160.1-1 (1991), that the failure to provide Thoman with the opportunity to formally protest may have led to a flawed decisionmaking process, and that Thoman was ultimately injured by BLM's action. We have set forth above both Judge Child's conclusions on these points and the facts which led him to these conclusions. Suffice it for present purposes to note that our own review of the facts of record fully substantiates Judge Child's findings and that we believe no further belaboring of these points is warranted.

[1] The only question which we deem compelling enough to justify any independent analysis on our part is the assertion by BLM that the matter should have been considered moot at the outset since all trailing had occurred almost coincident with BLM's approval 5/ and no future trailing across the Lombard Allotment was authorized. (Statement of Reasons at 4.)

It is, of course, true that this Board has, in the past, declined to entertain appeals where the challenged action has already occurred and no effective relief can be afforded an appellant. See, e.g., Wildlife Damage Review, 131 IBLA 353 (1994). However, there is a well-recognized exception to this rule. The Board will not dismiss an appeal on the grounds of mootness where the issues raised therein are "capable of repetition, yet evading review." In re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51, 53 (1990) (quoting Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). It is clear that this case is one of those not properly subject to dismissal because of mootness.

The reality of the matter is that the gravamen of Thoman's argument was the failure of BLM to inform him, in advance, of its intention to approve BS&GR's application for a crossing permit and provide him with an opportunity to formally object to the proposal. Admittedly, had BLM taken the position that the failure to adequately notify Thoman was an unfortunate mistake which would not recur, dismissal of the instant appeal might have been appropriate. This, however, is not the position which BLM took. On the contrary, BLM, in effect, asserted that there was no requirement whatsoever to notify Thoman in advance. Indeed, under its interpretation of 43 C.F.R. § 4160.1-1 (1991) advanced below, there would never be the need to notify any permittee in any allotment of the pendency of a crossing permit application so long as the applicant and BLM agreed to the crossing.

5/ In fact, to the extent that BS&GR crossed the Eighteenmile Allotment prior to obtaining any authorization, one might argue that it was moot before it was approved.

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Under this interpretation, the likelihood of similar situations arising in the future is obvious, as is the difficulty which would be faced in ever obtaining review before trailing occurred, given the absence of notification and the normally short duration of crossing permits. Having asserted the right not to notify grazing permittees prior to issuing crossing permits, BLM cannot simultaneously seek to prevent permittees from challenging this assertion by claiming that they failed to seek review until after the crossing had occurred.

[2] Judge Child found that, absent emergency conditions or an agreement between BLM and parties holding grazing privileges in an allotment, 43 C.F.R. § 4160.1-1 (1991) required notification of those permittees and provision of a period of time to protest prior to authorizing trailing through the allotment. We agree with this interpretation of the regulation. Moreover, we expressly find that BLM's actions herein did not constitute "substantial compliance" with the grazing regulations within the meaning of 43 C.F.R. § 4.478(b).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, Judge Child's determination is affirmed.

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James L. Burski
Administrative Judge

I concur:

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T. Britt Price
Administrative Judge